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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

VICTORIA BUCKLEY, Colorado Secretary Of State,

Petitioner/Cross-Respondent.

vs.

AMERICAN CONSTITUTIONAL LAW FOUNDATION, INC., DAVID AITKEN, JON BARAGA, CRAIG ELEY, JACK HAWKINS, LONNIE HAYNES, ALDEN KAUTZ, and BILL ORR, and WILLIAM DAVID ORR,

Respondents/Cross-Petitioners,

ON PETITION FOR A WRIT OF CERTIORARI to the United States Court Of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER VICTORIA BUCKLEY'S PETITION FOR WRIT OF CERTIORARI

NEIL D. O'TOOLE*
LAW OFFICE OF NEIL O'TOOLE P.C.
226 West 12th Avenue
Denver, CO 80204
(303) 595-4777

PAUL GRANT Pro hac vice
19039 E. Plaza Drive, #260E
Parker, CO 80134
(303) 841-9649

BILL ORR
Pro Se
2075 S. University, #240
Denver, CO 80210
(303) 595-5738

Attorneys For Respondents/Cross-Petitioners

**Counsel Of Record*

16 pp

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding. There are no parent corporations.

TABLE OF CONTENTS

PAGE

PARTIES TO THE PROCEEDING i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

ARGUMENT 2

A. PETITIONER/CROSS-RESPONDENT MISCHARACTERIZES THE ISSUE 2

B. THE RIGHT OF UNREGISTERED CITIZENS TO CIRCULATE A PETITION IS PROTECTED BY THE FIRST AMENDMENT 4

C. COLORADO'S BADGE REQUIREMENTS VIOLATE THE RIGHT TO ANONYMOUS SPEECH PROTECTED BY THE FIRST AMENDMENT. 7

D. THE REPORTING REQUIREMENTS ARE OVER-BROAD 9

CONCLUSION 11

TABLE OF AUTHORITIES

CASES **PAGE**

American Constitutional Law Foundation v. Meyer, 120 F.3d 1092 (10th Cir. 1997) 1, 6, 8

Clark v. Jeter, 486 U.S. 456, 461, 108 S. Ct. 1910, 1914, 100 L.Ed.2d 465 (1988) 6

First National Bank of Boston v. Belotti, 435 U.S. 765, 790, 98 S.Ct. 1407, 1423 (1978) 10

McIntyre v. Ohio, 514 U.S. 334 (1995) 7

Meyer v. Grant, 486 U.S. 414, 108 S.Ct. 1886 (1988) 2, 10

STATUTES

C.R.S.A. §1-40-121 ..... 8, 10, 11
C.R.S.A. §1-40-130 8,11
C.R.S.A. §1-40-131 11
C.R.S.A. §1-40-132 ..... 9, 11

STATEMENT OF THE CASE

This Brief will respond to the Petition for Certiorari filed by Colorado Secretary of State Victoria Buckley.

This Petition is one of two Petitions seeking this Court's review of the Tenth Circuit's Opinion finding certain portions of Colorado petition circulation law unconstitutional while upholding others. Respondents/Cross Petitioners American Constitutional Law Foundation, *et al.*, have filed a Petition for Certiorari on issues which were determined adversely to their First Amendment rights by the Tenth Circuit in *American Constitutional Law Foundation v. Meyer*, 120 F.3d 1092 (10th Cir. 1997).

As detailed below, there is no cause for this Court to overturn the Tenth Circuit's Opinion on the issues of registered circulator, the mandatory badge requirement and the filing of initial reports concerning amounts paid to circulators and the identity of petition circulators.

ARGUMENT

A. PETITIONER/CROSS-RESPONDENT MISCHARACTERIZES THE ISSUE.

The Petitioner/Cross-Respondent ("State") erroneously attempts to apply standards of ballot access to the First Amendment issues raised in this case. These issues involve "core" political speech and the First Amendment right of citizens to seek redress of grievances by circulating citizen petitions. Laws which affect these rights must be subjected to strict scrutiny.

The State asserts that the constitutionally permissible area of regulation of the petition process has not been adequately defined. This is erroneous.

In *Meyer v. Grant,* 486 U.S. 414, 108 S.Ct. 1886 (1988) this Court established that petition circulation constitutes "core" political speech where the protection of the First Amendment is at its zenith.

The State suggests that the statutory and constitutional provisions which limit circulation of petitions to registered voters, mandate wearing identification badges, require detailed reporting of the identity of circulators, constitute regulation of elections to assure order accompanies the democratic process. This is an erroneous characterization of petition circulation.

Petition circulation is pure speech. The gathering of signatures is not "voting". Thus, when the Petitioners suggest that the "circulator collects the votes and presents them to the Secretary of State to be validated and counted" (Petitioner's Brief, p. 11), they are not accurately describing the process of petition circulation.

Voting on a petition does not take place until a general election, at which time the petition is subjected to intense public scrutiny. Indeed, there is ***no*** requirement during the period of circulation of petitions that signatures be gathered only from supporters of the initiative. Citizens such as the Respondents/Cross-Petitioners are likely to sign petitions,

although they may oppose the initiative once it is placed on the ballot, because they believe that petition circulation is the most effective means for redressing grievances — a right guaranteed under the First Amendment.

In sum, the issues raised here are not of a ballot access nature. Rather, they implicate free speech and the right to petition for redress of grievances.

B. THE RIGHT OF UNREGISTERED CITIZENS TO CIRCULATE A PETITION IS PROTECTED BY THE FIRST AMENDMENT.

The State argues that the registration requirement "has little, if any, effect on protected speech," since there are 1.9 million persons registered to vote in Colorado. Under this faulty reasoning, registering is a simple process which does not unduly limit the right to participate in the petition circulation process.

However, the First Amendment "core" right to engage in political speech and to petition for redress of grievances,

may not be conditioned on whether an individual has opted to become a registered voter.

Here, Respondent Bill Orr testified that he had not registered to vote because of his political beliefs. The First Amendment grants him the right to engage in political speech, which is protected at the highest level during the circulation process, regardless of his political beliefs. He cannot be deprived of this right because the State believes registering to vote is "simple." In Orr's case, registering is not "simple." Rather, it would compromise his basic political beliefs. Thus, the State cannot demonstrate that it has a compelling interest in conditioning Orr's right to participate in political speech on his participation in organized politics.

This case has nothing to do with the qualification of public officials, time deadlines for registering in a primary, or the registration requirements in a primary. Rather, it deals with the First Amendment right to petition for redress of grievances using the protected right to engage in political speech.

In sum, the Tenth Circuit correctly stated:

> Under an equal protection analysis, classifications that impinge on the exercise of a fundamental right are subject to the most exacting scrutiny. See *e.g., Clark v. Jeter*, 486 U.S. 456, 461, 108 S. Ct. 1910, 1914, 100 L.Ed.2d 465 (1988). . . .[W]hen a statute allows some people to speak but not others the principles of equal protection and free speech are intertwined.
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> . . .
>
> The registration requirement has a discriminatory effect. It bars persons who are not registered voters from circulating petitions, therefore excluding that group of persons from participating in core political speech. . . . . Colorado acknowledges there are at least 400,000 qualified but unregistered voters in the state. Mandatory exclusion of unregistered circulators also limits the number of voices to convey the proponents' message, limiting the audience that proponents can reach and making it less likely that they will be able to gather the required number of signatures to place on the ballot.

American Constitutional Law Foundation v. Meyer 120 F.3d 1092, 1100 (10th Cir. 1997).

The State suggests in its brief (p. 3) that the 1980 Colorado amendments to the Colorado Constitution were "designed to offset the requirement that signers and circulators must be registered electors." In support of this argument, it attaches as Appendix E a legislative history which ***was not*** part of the record below. Further, Appendix E does not support this assertion.

Since evidence supporting this contention was not presented at trial, State's Appendix E is objected to.

In conclusion, The State's factual allegation concerning the purpose of the registration requirement is misleading and not supported by the record.

C. COLORADO'S BADGE REQUIREMENTS VIOLATE THE RIGHT TO ANONYMOUS SPEECH PROTECTED BY THE FIRST AMENDMENT.

As Ohio did in *McIntyre v. Ohio*, 514 U.S. 334 (1995), the State argues that the badge requirements for circulators are necessary to avoid fraud, even though Colorado

has provided for criminal sanctions for fraud under C.R.S. A. §1-40-130(2).

The Tenth Circuit correctly pointed out that the badge requirement forces circulators to reveal their identities when they are delivering their political message - a time when the reaction to their message be most intense. See *American Constitutional Law Foundation v. Meyer, supra* at 1102.

At trial Respondent/Cross-Petitioner John Baraga testified that he had personally experienced harassment while circulating a hemp initiative; and that the identification requirement made it more difficult to find circulators because of fear of retaliation. Likewise, Respondent/Cross-Petitioner Hawkins testified that potential circulators were not willing to wear badges as required by the state. As a consequence, Respondents have shown that the badge requirement burdens "core" political speech.

The badge requirement, on its face, is intended to inform potential signers whether the petition circulator is a

volunteer or paid. This information has no bearing on the issues the circulator addresses during petition circulation; and places a burden which cannot be supported by any compelling state interest.

Since there are other reporting requirements which detail election expenditures, and which adequately identify to the state the nature of petition circulation, the badge requirement is superfluous.

Finally, the petition itself identifies the circulator who must affirm under oath his compliance with Colorado law. See C.R.S. A. 1-40-132.

To its brief, the State attached Appendix F to support its argument that the badge requirement is permissible. This evidence was ***not*** part of the record at trial and Respondents/Cross-Petitioners object to its inclusion.

D. THE REPORTING REQUIREMENTS ARE OVER-BROAD.

The risk of corruption perceived in candidate-election cases is not present in a popular vote on a public issue.

See *First National Bank of Boston v. Belotti*, 435 U.S. 765, 790, 98 S.Ct. 1407, 1423 (1978)

C.R.S.A. §1-40-121 is a generally applicable requirement for paid circulators which requires monthly reports in which the proponents of a petition must provide the "name, address and county of voter registration of all circulators who are paid to circulate any section of the petition" when reporting amounts paid to a circulator.

This broad provision compels the disclosure of the name and address of paid circulators regardless of the amount received to circulate, without a monetary threshold.

This provision, like the identification badges, chills paid circulation which is a constitutionally protected exercise of First Amendment rights. *Meyer v. Grant, supra.*

To the extent that Colorado law already provides for disclosure of amounts paid to circulate petitions, the asserted state interest of determining the amount of public support is already served.

The detailed reporting of the identity of paid circulators is not necessary to protect against fraud. There are other mechanisms in Colorado statutes which adequately protect against fraud in circulation. See C.R.S.A. §1-40-130, and §1-40-131 (criminalizing certain misconduct during circulation); C.R.S.A. §1-40-132 (authorizing the Secretary of State to void petition).

The detailed reporting requirement of C.R.S.A. §1-40-121 cannot survive strict scrutiny because it chills political speech without being narrowly tailored to meet a compelling state interest.

CONCLUSION

WHEREFORE, for the reasons given above, Respondents/Cross-Petitioners request the State's Petition for *Certiorari* be denied.

NEIL D. O'TOOLE
Counsel of Record
LAW OFFICE OF NEIL O'TOOLE P.C.
226 West 12th Avenue
Denver, CO 80204
(303) 595-4777

PAUL GRANT
Counsel of Record/Pro hac vice
19039 E. Plaza Drive
Parker, CO 80134
841-9649

BILL ORR
Pro Se
2075 S. University, #240
Denver, CO 80210
595-5738

Attorneys for Respondents/Cross-Petitioners